

# BZA Application No. 20867

**1934 35<sup>th</sup> Place, NW  
Stephanie Ajello  
March 15, 2023**

Board of Zoning Adjustment  
District of Columbia  
CASE NO.20867  
EXHIBIT NO.37

**Sullivan & Barros, LLP**



# Overview and Requested Relief

- Existing legally nonconforming flat (2-unit) building.
- C of O for a flat for at least 65 years, although it was likely purpose-built as a flat (constructed in 1935, earliest C of O from 1958).
- Lot and units are small and the building is in need of repairs. The lot is 865 sq. ft., top unit is 540 sq. ft., bottom unit is 560 sq. ft.
- Proposing to construct a third story addition (530 sq. ft.) and replace existing rear stair/landing.
- Area variance needed as building is non-conforming with respect to lot occupancy (~67%); existing rear stair brings total lot occupancy to 69.8%.
- Replacement stair required to bring egress into code compliance, but increases lot occupancy by 0.2%, or 1.73 ft. and decreases existing non-conforming rear yard, from 11 ft. to 7.7 ft. Third story addition is slightly above lot occupancy (61.5%) and would otherwise be permitted via minor deviation but for the use.
- Even though only one unit is being expanded, Use Variance Relief (C-204.1) is being requested for both the third story addition and replacement of the deck because this may be considered the expansion of a legally non-conforming flat in the R-20 zone.



# Community Support

The Office of Planning recommends approval

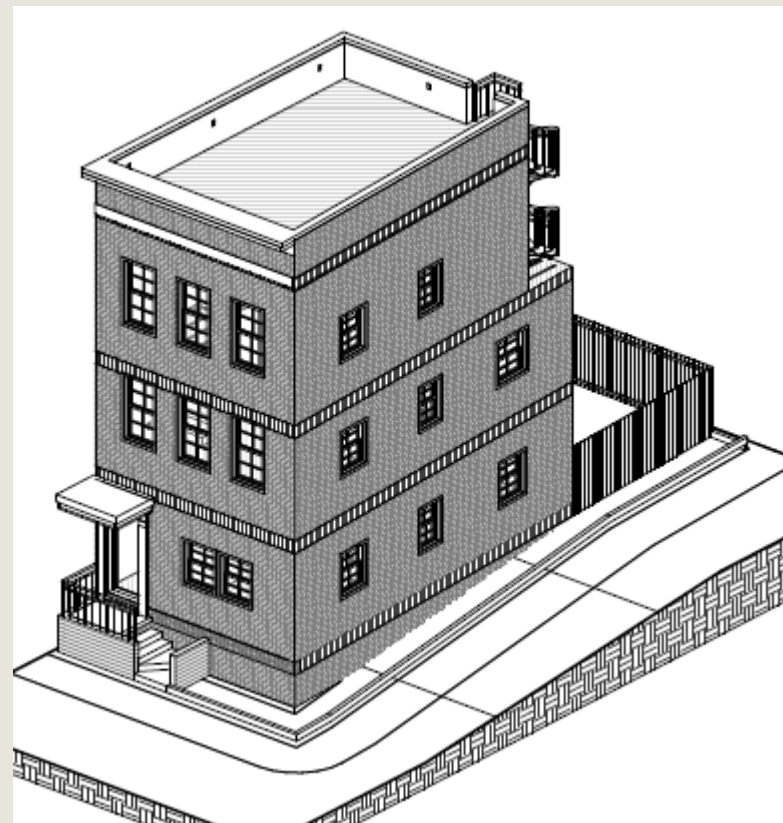
ANC Supports

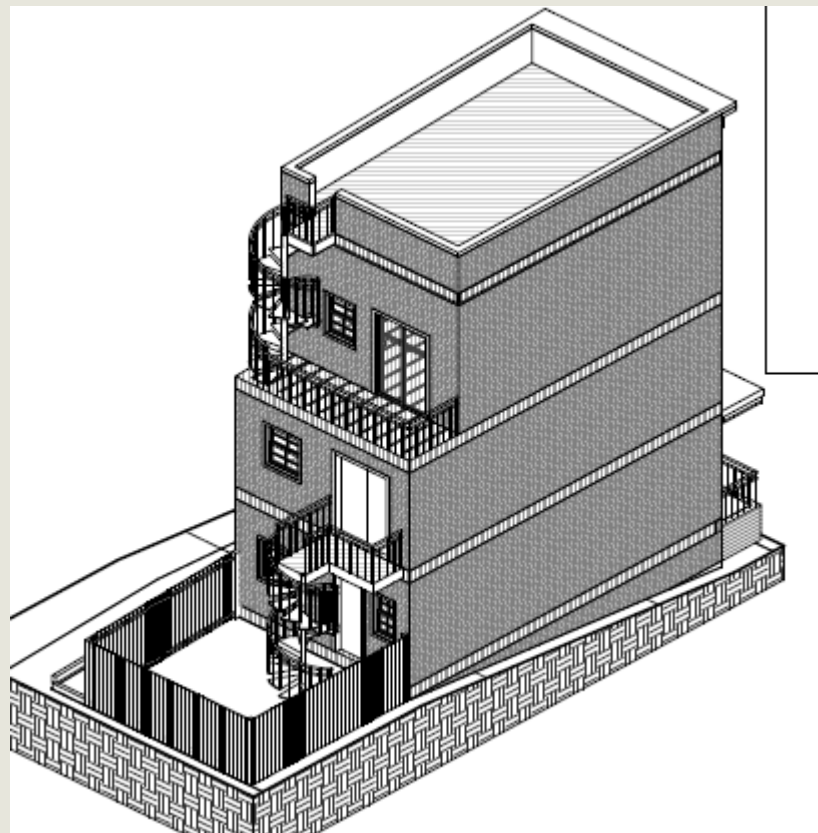
DDOT has no objection

Support from both adjacent neighbors (west and south)

- Neighbor to the south supports in writing (1932 35<sup>th</sup> Place)
- Neighbor to the west, across the alley supports in writing (3526 Whitehaven)

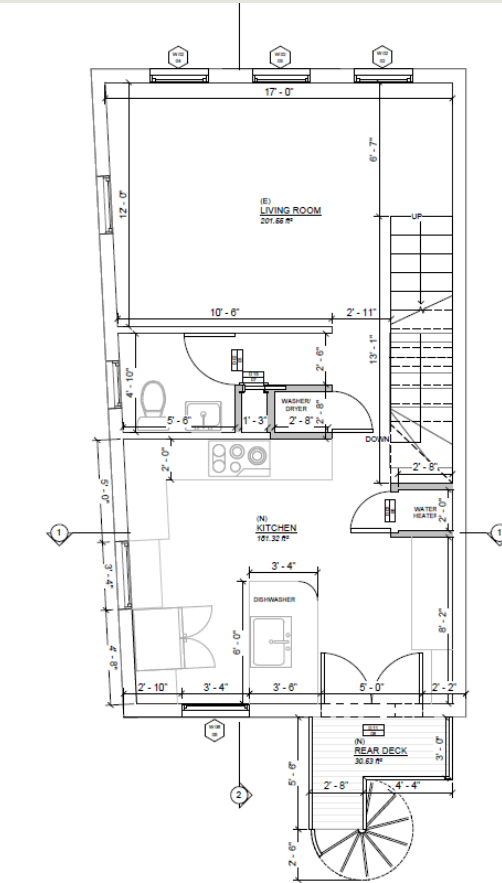
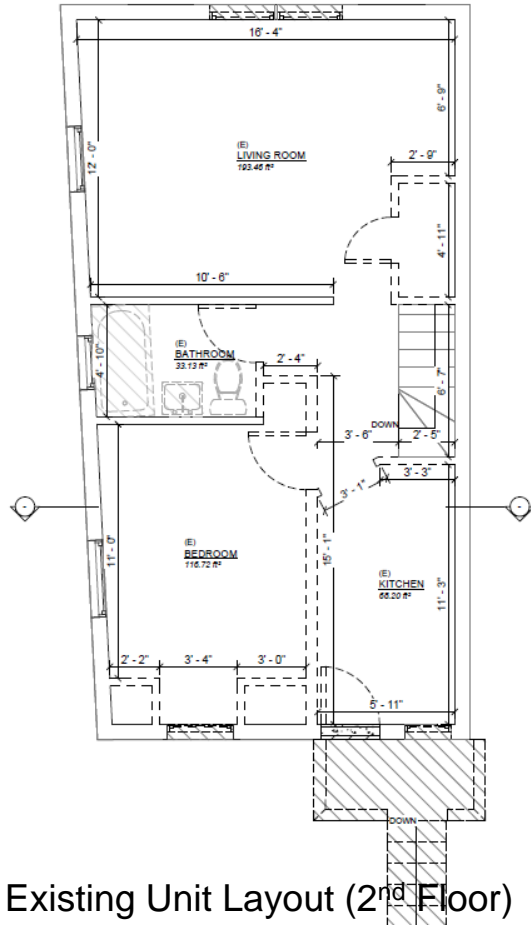






# Unique and Exceptional Conditions

- The first C of O for a flat was issued in 1958 (noting that the previous use was also a flat).
- Therefore, the Building has been used as a flat since 1958, and likely since 1935.
- Other properties in the area can construct a 3<sup>rd</sup> story addition as a matter of right– directly adjacent properties and many others on this block have already done third story additions.
- There are other flats across the street, but those are much larger and have double the living space.
- Subject Property is the smallest lot in the square, at 865 sq. ft., other lots are 924 sq. ft.
- The units are exceptionally small, the top unit is only 540 sq. ft. whereas the average 1BR unit in DC is about 700-720 sq. ft.
- Awkward layout with tiny kitchen and bathroom spaces; almost no storage space.
- Applicant is only seeking relief to expand one unit- critical distinction between all other NC residential expansion BZA cases under C-204.1.
- Layout issues notwithstanding, the building needs basic updates and repairs to simply function as-is.
- Due to the building's age, it requires significant repairs and renovations to be brought up to modern standards (ex. HVAC, new water heater, electrical system, roof repairs, façade repairs).







# Undue Hardship

## Option 1: Do nothing

- Costly invasive repairs are still necessary to bring building up to modern standards (HVAC, new water heater, electrical system, roof repairs, façade repairs).
- Without the work, the building will continue to deteriorate and have potential code issues.
- Repair work that is associated with that would require occupants to be out of the unit for a number of weeks or months depending on the extent of the work and timing of the various contractors.
- While the repairs would attempt to modernize the building and unit, without additional space, the unit itself will never be up to modern standards because of its size and layout.
- Applicant has contemplated simply adjusting the layout, but 540 square feet is very limiting and again, not worth executing without additional living space.
- Without relief, rear stair could never be replaced because an in-kind replacement would violate the building code.

# Undue Hardship

## Option 2: Remove the Second Unit

- By-right option if addition is pursued is the loss of one residential unit— currently has two units she can rent (or sell).
- Removing a unit to do an addition would result in a loss of a rentable unit or sellable unit, so no addition is worth losing a sellable or rentable asset, given the maximum added square footage is about 530 sq. ft.
- Distinguishable from another recent 2-unit addition case opting to convert the lower unit to an ADU for several reasons: (1) personal circumstances do not apply here in the same way and therefore the goal of maintaining only one rental unit with the overall goal to live in the house forever with an aging parent does not apply; (2) applicant in this case is only proposing to increase one unit; and (3) there is no room to expand the building beyond what we are proposing; therefore there is a limit to added value due to the size of the subject property compared to the other case.
- BZA Case No. 20815- proposed to expand the lower unit as well as the upper unit; added benefit to that particular applicant of choosing to go the ADU route in that even though the applicant lost an asset, effectively, or reduced the value by removing a unit, it was able to achieve an increase the living space in the overall building by 800 square feet because that applicant had a much larger lot, and personal reasons made it possible to anticipate long-term residence in the building. That analysis would not apply in this case and touched on personal aspects. The analysis in the subject case is objective and directly related to the state of the building and other unique factors described herein.

## Option 2: Remove the Second Unit

- Requires owner to permanently reside in the Building: An ADU is not the same as having two separate units- ADU requires the owner reside in the PDU and the units cannot be rented out at the same time.
- Loss of rental income: Option to rent two units currently vs. option to rent one AND always be required to live in the building, so she would have to sell the building if she wanted to move, rather than just rent out the two units and maintain ownership of the asset.
- Loss of an asset: Also, possible to condo the building and sell the two units currently. But an ADU cannot be sold separately.
- Future Sale is limited: Any future owner/purchaser of the building could similarly only rent the ADU if they lived in the house; not the same as selling a 2-unit building in terms of value.
- By-right option requires that she get rid of an asset, effectively, in order to add space. And that is an undue hardship because it lowers the property value and it is a loss of value to her, immediately (owning 2 units vs. owning 1 unit). The addition of 540 sq. ft. is not worth the loss of a separate unit of 560 sq. ft. that an owner could sell or rent independently of the top unit.

## BZA Cases

- Prior to 2016 regs, the Board previously determined that a flat in an R zone could expand by right– except for any increases to nonconformities related to the structure, of course (lot occupancy, rear yard).
- 2016 Regulations clarified that a flat is a legally existing nonconforming use which cannot be enlarged without relief. Since then, 7 cases have been brought before the Board seeking relief from C-204.1 (subject case is the 8<sup>th</sup>).
- The only other case involving a flat was decided last month and is distinguishable from the present case, as discussed in slides 11-12.
- Of the other cases, five cases involved the expansions of existing apartment buildings, one was related to expansions of lodging uses.

**Case No. 19327:** Proposal to construct an exterior egress stair and penthouse structure to an existing hotel use in the RA-5 Zone. Applicant asserted it required a renovation to remain competitive, driving the need for external egress. OP recommended approval and the Board agreed that *“the relief is very understandable in order to preserve and extend the life of the building and it doesn't seem like there's any adverse effect associated with it, even though there's you know, this additional footprint and there's no penthouse setback.”*

**Case No. 19709:** Proposal to construct a rear addition to an existing nonconforming four-unit apartment house in the R-3 zone. Applicant asserted that removing units would be an obvious financial hardship with respect to the value of the building, as it was a legally existing 4-unit building. OP recommended approval, noting in its report, *“Without the granting of this variance it would be more difficult for the applicant to bring the existing building up to modern living standards.”* The Board agreed and noted that “there was no intensity of the use, since it is already a four-unit configuration” and the apartment building has existed since 1941 and the applicant seeks to modernize it to create family-sized housing.

**Case No. 19690:** Proposal to construct a third story and rear addition to an existing four-unit apartment house. Applicant asserted it required the expansion in order to increase and modernize the small units (626 sq. ft.). OP recommended approval, stating, noting at the hearing, *“I think what's different about this compared to some other nonconforming uses that are expanded is that it's going from a four-unit apartment building to a four-unit apartment building. So the use is not really changing although the size is increasing. I think this would be completely different if they were asking to convert it to a six-unit apartment building while expanding it. But this is just, the purpose of it is to modernize the units. And I think that's where it also [sic] is not a detriment to the public good because it's improving the building.”* Hearing transcript p. 53-54

The Board agreed that *“I think this building was built in like 1935 so the need to modernize and possibly expand I can understand the logistics there and I can also understand the cost associated with just doing a modernization as a matter of right, how that could impose hardship to the applicant.”* Hearing transcript p. 55

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- Subject case is similar in that the building was constructed in 1935 and the unit proposed to be expanded is small, 540 sq. ft., the building needs basic upgrades and modernizations to preserve the life of the building, but cannot fully achieve that goal without additional living space, as a 540 sq. ft. apartment in this configuration is not up to modern living standards.

# Requirement to Grant Use/Area Variance Relief

## **No Substantial Detriment to Public Good or the Zone Plan**

- The Building is already configured as a flat and has been for at least 65 years.
- Overall lot occupancy increase is negligible (0.2%).
- The deck is being replaced in its current location, so there will be no impacts to privacy or use of enjoyment for neighboring properties.
- The building is being improved so it does not become (further) dilapidated, and an overall improvement to the building and a third story addition that would match the only directly adjacent buildings would improve this corner and the block, generally.
- Further, the intensity of use is not increasing, this is not an expansion of a commercial use, residential uses are permitted in R zones and this preserves existing (and more affordable) housing stock in this area.
- Most importantly, the proposal is to increase only one of the units, not both units.

Questions?

# Is this an expansion of a nonconforming use?

C-204.1: “A nonconforming use of land or structure shall not be extended in land area, gross floor area, or use intensity; and shall not be extended to portions of a structure not devoted to that nonconforming use at the time of enactment of this title.”

C-204.2: “Where the nonconforming use occupies only a portion of the structure, the restrictions in this section shall apply only to that part of the structure devoted to the nonconforming use.”